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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 LANTHEUS MEDICAL IMAGING,
4 INC.,

Plaintiff,

5 v.

10 CV 9371 (JPO) (JLC)

6 ZURICH AMERICAN INSURANCE
7 COMPANY,

8 Defendant.

9 -----x

New York, N.Y.
December 9, 2011
10:40 a.m.

11 Before:

12 HON. JAMES L. COTT

13 Magistrate Judge

14 APPEARANCES

15 COVINGTON & BURLING LLP

16 Attorney for Plaintiff Lantheus Medical Imaging, Inc.

17 BY: RUKESH A. KORDE

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21 BY: DANIEL MARK KRAININ

EDWARD MAXWELL GRAUMAN

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1 (In open court; case called)

2 THE COURT: Good morning gentlemen.

3 Everyone can be seated.

4 I have read all of the papers in this case actually
5 several times. And thought that I would benefit from having
6 argument, as I think the issues are complex and worthy of
7 having the parties talk through them in this context.

8 So, Mr. Korde, why don't I hear from you first since
9 it's your motion.

10 MR. KORDE: Thank you, your Honor.

11 Your Honor, from Lantheus' perspective, this motion
12 presents one straightforward question: Does the Foreign
13 Sovereign Immunities Act prevent this Court from issuing the
14 amended letters rogatory?

15 Let me just briefly give the Court some background to
16 explain why we think this is the only question at issue in this
17 motion and why we think the answer to that question is that the
18 Foreign Sovereign Immunities Act does not prevent this Court
19 from issuing the amended letters rogatory.

20 In this instance, the amended letters rogatory
21 requests the assistance of the Canadian courts in obtaining
22 information from Atomic Energy of Canada Limited, a Crown
23 corporation.

24 The information that Lantheus seeks has to do with the
25 reasons for and the causal mechanism of the shutdown of a

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1 commercial nuclear reactor, the NRU reactor, which is operated
2 by AECL.

3 The information, your Honor, is vital to the
4 plaintiffs' case. The dispute between Lantheus and Zurich
5 turns on the application of certain insurance policy exclusions
6 related to corrosion and maintenance. And applying those
7 requires detailed and specific information as to what exactly
8 happened to the NRU reactor.

9 Lantheus had previously sought this information by
10 letters rogatory issued by Judge Swain in May of 2011.

11 We took those letters rogatory to the Canadian courts.
12 And Justice Pollack of the Canadian Court declined to enforce
13 the letters rogatory based on an argument by AECL that this
14 court had not considered whether the Foreign Sovereign
15 Immunities Act prevents it from issuing letters rogatory as to
16 AECL because AECL is a foreign sovereign instrumentality.

17 THE COURT: You say the Foreign Sovereign Immunities
18 Act doesn't apply here because it's a jurisdictional question
19 and the issuance of the letters rogatory really doesn't
20 implicate jurisdiction; is that right?

21 MR. KORDE: That's exactly right, your Honor.

22 Jurisdiction --

23 THE COURT: Well that's exactly right that I
24 understand your argument. I don't know that it's exactly right
25 as a matter of law. That's what I wanted to hear you address.

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1 MR. KORDE: Sure.

2 Well we think that that's right for three reasons,
3 your Honor.

4 First of all, if you look at the rationale behind the
5 Foreign Sovereign Immunities statute and the letters rogatory
6 process, you can see that the rationales indicate that the
7 Foreign Sovereign Immunities Act is a jurisdictional statute;
8 that there's nothing in the Foreign Sovereign Immunities Act,
9 at least for our purposes, that goes to anything other than
10 jurisdiction. That's what the legislative history says.
11 That's what the plain text of the statute says.

12 THE COURT: There's nothing in the plain text of the
13 statute that really sheds any light directly on the question
14 that's presented to the court, is there?

15 MR. KORDE: Well, I would say that by omission there
16 is, your Honor.

17 Because if Congress had intended to regulate the
18 issuance of letters rogatory by the Foreign Sovereign
19 Immunities Act, it would have said so in the statute.

20 And, in fact, the legislative history says this is
21 purely a jurisdictional statute.

22 And we've put in our brief Second Circuit case law
23 which makes clear that in interpreting a statute like this you
24 just look at the plain language of the text.

25 THE COURT: What do you make of the Restatement of the

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1 Foreign Relations Law of the United States which says,
2 "Discovery from a foreign state that is not a party to a
3 proceeding has apparently not been attempted in international
4 practice and is not provided for in either the FSIA or the
5 corresponding laws of other states. Since sovereign immunity
6 is the rule, and amenability to judicial process an exception
7 to the rule, such discovery would seem to be precluded."

8 MR. KORDE: I think there are two points to make
9 there, your Honor.

10 The first one is that that provision that you just
11 read makes clear that the FSIA doesn't apply to the situation
12 we're in here today.

13 But the second and more important point is that that
14 is a provision that deals with an attempt to get discovery from
15 a foreign sovereign directly using the power of this court to
16 issue a subpoena to AECL.

17 THE COURT: Let's talk about that scenario for a
18 minute.

19 If AECL were present in the United States as a
20 nonparty but as a Crown corporation of Canada, would the
21 Foreign Sovereign Immunities Act be implicated if you served a
22 Rule 45 subpoena on them?

23 MR. KORDE: It might be, your Honor. But we think
24 that the commercial activities exception --

25 THE COURT: Leave the exception to the side for the

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1 moment and we'll come back to it.

2 The threshold question that you've presented is
3 whether the Foreign Sovereign Immunities Act applies.

4 You say it doesn't, I shouldn't be concerned about it.

5 I'm asking you not our case but a hypothetical
6 question. If AECL were in the United States as a Crown
7 corporation having an office or otherwise present in the United
8 States and you wanted discovery from them because it was
9 relevant to your lawsuit against Zurich, would the Foreign
10 Sovereign Immunities Act apply and, therefore, prevent you from
11 getting it unless an exception applied?

12 MR. KORDE: Yes, it would.

13 However, I think the hypothetical that your Honor is
14 suggesting is, with respect, somewhat off the mark. Because
15 what we're talking about here is not a subpoena. What we're
16 talking about here is simply a request.

17 THE COURT: What's the difference between a Rule 45
18 subpoena to a nonparty in the United States and a letters
19 rogatory to a nonparty outside the United States?

20 MR. KORDE: That's a good question, your Honor.

21 And the difference is that a Rule 45 subpoena relies
22 on this court's power to compel responses.

23 A letter request doesn't -- is not backed up by any --
24 by this court's power to compel. There is no threat of
25 sanction from this court if AECL doesn't comply.

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1 It's simply a request to the Canadian courts to say
2 will you help Lantheus obtain this information that's crucial
3 to the case.

4 THE COURT: Well that makes it sound to me like you
5 think a letters rogatory and the issuance of it is recently a
6 ministerial act.

7 Is that a fair characterization from your standpoint?

8 MR. KORDE: We think so, your Honor.

9 We think that the issuance of a letters rogatory
10 are -- it's standard procedure in transnational disputes; that
11 you get letters rogatory from your home state, from your home
12 court, and the decision as to whether or not there is an
13 enforcement and whether the failure -- the failure to comply
14 with the enforcement order, that's supervised by the foreign
15 court, in this case by the Canadian court. So it would be the
16 Canadian court's discretion as to whether or not to enforce it.
17 And the Canadian court's application of Canadian law as to what
18 would be required to be produced.

19 THE COURT: That's true in the normal course.

20 But let's not lose track of what's before me, which is
21 a very much more narrow, but I think problematic, set of facts
22 which is that the subject of your letters rogatory here is
23 affiliated with a foreign sovereign. So this is not your --
24 you're not just seeking something from a Canadian company.
25 You're seeking something from a Canadian company that has a

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1 relationship with the Canadian government. And that's quite
2 different, although limited.

3 So, for example, when you suggest that if the Foreign
4 Sovereign Immunities Act is otherwise implicated here, it would
5 have a detrimental effect more broadly for the issuance of
6 letters rogatory in the context of commercial disputes. I
7 think that might be slightly overstated. Because as we can
8 see, giving the paucity of case law that exists, it's fairly
9 rare that a letters rogatory issued to an entity affiliated
10 with a foreign company -- I haven't read a single case, and
11 maybe you can direct me to one that I missed in your papers or
12 your adversary's papers, whose facts are identical to this and
13 a court really addressed with thoughtful and thorough analysis
14 whether the Foreign Sovereign Immunities Act is implicated in
15 this context.

16 Is there such a case?

17 I mean the Arizona case, for example, both sides seem
18 to discuss it as if it's precedent. It looks to me like a form
19 that the judge signed. There isn't a single case cited in it.
20 So I don't really know much what to make of that, for example,
21 as the one that seems otherwise sort of closest. But it
22 doesn't give me any guidance.

23 Are there cases that I'm missing that are like ours?
24 Or isn't this really a sui generis case?

25 MR. KORDE: Your Honor I, think three points.

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1 First of all, I think that the Al-Misehal case, the
2 Arizona case, I don't believe it's just simply a form that was
3 entered, because there is some discussion of what exactly
4 was -- why the testimony sought from the Crown Prince of Saudi
5 Arabia was relevant to the case at issue, albeit a
6 paragraph-long discussion.

7 THE COURT: Without any case citation.

8 MR. KORDE: Without any case citation.

9 THE COURT: And it seems obvious that because he was
10 in the business of renting vehicles that, were one to have
11 drilled down and actually analyzed it, assuming the Foreign
12 Sovereign Immunities Act might have been implicated, the
13 commercial activities exception also clearly would have been
14 implicated.

15 MR. KORDE: With respect, your Honor, what you had in
16 that case was a commercial dispute between Al-Misehal on the
17 one hand and the Armored Group LLC on the other, and the Crown
18 Prince was a third party witness to that dispute.

19 What you got here is a commercial dispute between
20 Lantheus and Zurich and the foreign sovereign entity is a third
21 party witness.

22 So I think the facts are very close.

23 And the fact that --

24 THE COURT: But this decision didn't address the
25 Foreign Sovereign Immunities Act one way or the other.

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1 You're drawing from it that it didn't say anything
2 about it that, therefore, I don't need to think about the
3 Foreign Sovereign Immunities Act. I'm not sure that's the
4 logical inference.

5 MR. KORDE: Well I think, your Honor, that that's one
6 of several cases in which courts are not troubled by the fact
7 that they're issuing letters rogatory to foreign sovereign
8 instrumentalities.

9 If it were one case in which the court did -- did or
10 did not make that consideration, that would be one thing. But
11 I think there are several other cases that we cite, the E-BEAM
12 case, the Danisch case and, running the other way, a letter
13 rogatory from the Ontario court to the United States, the
14 Kevork case, in which it's not really considered -- this notion
15 of sovereign immunity isn't really seen to intersect the letter
16 rogatory process.

17 THE COURT: Let's step back for a minute. Let's talk
18 about this at 30,000 feet, more generally.

19 The Foreign Sovereign Immunities Act was passed to
20 ensure that American courts are solicitous of foreign entities
21 and foreign countries when they are sued in the United States,
22 right? And unless there are exceptions to the immunity,
23 foreign countries and those affiliated with it are immune,
24 right?

25 Isn't that right? Is that what Foreign Sovereign

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1 Immunities Act stands for in broad terms?

2 MR. KORDE: I think it would cast it somewhat
3 differently, your Honor.

4 My understanding from the legislative history is that
5 the Foreign Sovereign Immunities Act was passed so that courts
6 could make decisions about whether they had jurisdiction over
7 foreign sovereigns or not as opposed to having the state
8 department make those decisions.

9 And the purpose of that was that you wanted to have
10 some sort of transparency about when foreign sovereigns could
11 be hailed into court and when not. That's one purpose.

12 The other purpose was that you wanted to limit the
13 ability of a court to hail a foreign sovereign and compel it to
14 submit to American jurisdiction and compel it to submit to
15 American law for actions that are taken as sovereign, sovereign
16 actions, but not when the -- not when the foreign sovereign or
17 its instrumentality is simply acting as a commercial actor.

18 So I think those are the twin aims of the FSIA.

19 THE COURT: I guess what I'm focusing on a little bit
20 is there's a concern, as reflected in the statute, that
21 American courts be cautious and careful when the governments or
22 those affiliated with the governments of foreign countries are
23 brought before our courts. And when there is discovery
24 implicated, it's usually jurisdictional discovery, as you
25 suggest, to evaluate whether there is a proper basis for

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1 immunity to be invoked or not.

2 Why, if that's true, doesn't what follow from that
3 when a letters rogatory is being sought in an American court of
4 a foreign entity or those affiliated with a foreign entity,
5 that the American court should be similarly solicitous, if you
6 will, and take seriously the underpinning of the Foreign
7 Sovereign Immunities Act and whether any exception applies
8 before just willy-nilly signing off in an administrative and
9 perfunctory fashion on a letters rogatory?

10 MR. KORDE: Your Honor, the -- what we are asking for
11 is -- to be clear, the Foreign Sovereign Immunities Act is a
12 act that purports to regulate this Court's authority to compel
13 a sovereign to do something.

14 When you're simply -- when you're issuing a letter
15 rogatory to the Canadian courts you're simply asking the
16 Canadian courts for assistance.

17 So, the need to be solicitous I think is substantially
18 diminished because all you're doing is saying: Can you help
19 Lantheus get this information? And I'm not sure --

20 THE COURT: Well the Canadians --

21 MR. KORDE: The upshot of AECL's argument is that they
22 are immune from a request. And it seems to me that doesn't
23 make sense. You can't be immune from a request.

24 You can be immune from an obligation. You can be
25 immune from a legal requirement. And you can be immune from a

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1 punishment if you don't comply with your obligations.

2 But you can't be immune from a request. You can't be
3 immune from a court simply asking a question of a coordinate
4 court.

5 THE COURT: The Canadian court and the statute in
6 Canada requires that the letters rogatory be issued by a court
7 of competent jurisdiction, correct?

8 MR. KORDE: Correct.

9 THE COURT: What does that mean? What makes me
10 competent in that context to issue letters rogatory?

11 Am I competent without assessing whether AECL has a
12 right to invoke the Foreign Sovereign Immunities Act?

13 Or do I have to, as the Canadian court seemed to
14 suggest, at least consider it to assure it that I am a
15 competent court issuing letters rogatory because I've accounted
16 for it.

17 MR. KORDE: Your Honor, for the purposes of the
18 Canadian provision that requires the letters rogatory be issued
19 by a court of competent jurisdiction, that is satisfied simply
20 by the fact that this court has jurisdiction over the dispute
21 between Lantheus; i.e., that this is a court that is competent
22 to decide the dispute that is at issue between Zurich and
23 Lantheus.

24 So it can't just be some administrative tribunal or
25 some arbitral panel that is saying, you know, we're issuing a

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1 letter rogatory. It's got to be a court that actually has
2 jurisdiction over the dispute at issue.

3 THE COURT: Let's go back to the issue of whether AECL
4 were in the United States for a minute. Because I think there
5 may be an anomalous result in your analysis, unless I
6 misunderstand it.

7 If AECL were in the United States and you served it
8 with a Rule 45 subpoena, it could move to quash it on Foreign
9 Sovereign Immunities Act grounds, could it not?

10 MR. KORDE: It could file such a motion.

11 THE COURT: What's the difference between what it's
12 doing now and that scenario?

13 And if you were unsuccessful in opposing the motion to
14 quash, then you couldn't get from them in the United States
15 what you're telling me you think you can get from them outside
16 the United States.

17 Isn't that an anomalous result?

18 MR. KORDE: I don't believe so, your Honor.

19 Because, I mean -- first, with respect to -- if any
20 litigant is present in the United States, then it can -- you
21 can subpoena them and they can move to quash.

22 If they're not in the United States, you can't
23 subpoena them. So you have to use this letter rogatory
24 process.

25 It can't be that just because you're outside the

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1 United States you can't be subject to the letter rogatory
2 process.

3 But I think the more fundamental answer to your
4 Honor's question is that -- the anomalous result runs the other
5 way. Because what AECL is suggesting is that they could move
6 to quash a request.

7 And I make the same point that I made with immunity.
8 You can't quash a request. You can quash an action of a court,
9 you know, an order of a court to compel somebody to do
10 something. But you can't quash a request, which is just a
11 question from this court -- this court asking the Canadian
12 courts: Will you help Lantheus do this. That's all it is.

13 There is no -- the two are sui generis. You can't
14 quash a request. You can't be immune from a request.

15 THE COURT: Let me ask you a question about the
16 commercial activities exception if we can skip to that for a
17 moment.

18 I know it's not what you think. But let's assume for
19 argument's sake that I decide that the FSIA is implicated here,
20 if that's the right word. And then I decide that I will look
21 at the exception.

22 It seems to me that your submission suggests that the
23 record is insufficient to allow me to determine the exception
24 applies and that jurisdictional discovery of some kind needs to
25 be taken.

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1 Why can't I decide on the information presented to me
2 that the exception is, in fact, implicated and, therefore,
3 while the Foreign Sovereign Immunities Act applies, contrary to
4 your view, nonetheless the exception also applies.

5 So you might, if I can phrase it this way, lose the
6 battle but win the war.

7 MR. KORDE: Your Honor, I would be happy with that
8 result.

9 I think the point we were making in our brief was that
10 AECL's suggestion that the commercial activities exception
11 doesn't apply is based on a series of factual assertions that
12 have never been tested in discovery. And if the court is
13 inclined to go down that route, our preference would be to take
14 the discovery and decide the issue on a complete record.

15 If your Honor feels that he has sufficient information
16 to rule that the commercial activity exception applies, then
17 certainly I'm happy with that result.

18 I'm always happy to win the war.

19 THE COURT: What are your thoughts about the issues of
20 comity here and what rule, if any, they should play in the
21 Court's assessment of the issue presented?

22 MR. KORDE: Your Honor, we think that the Aerospatiale
23 comity analysis is completely misplaced in this context.

24 That analysis is tethered to a situation in which you
25 have a party, a litigant before the court, a foreign litigant

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1 before the court that's subject to, on the one hand, American
2 discovery law and American discovery obligations and, on the
3 other hand, is subject to some -- the laws of its home country
4 that preclude it from complying with those American discovery
5 obligations.

6 And in that situation where you have an actual
7 conflict of law with respect to one party that's whipsawed
8 between two different competing legal systems, that's when you
9 engage in a comity analysis to resolve the legal conflict.

10 This situation arises, for example, typically in
11 situations where you've got a foreign bank that's doing
12 business in the United States and somebody tries to get
13 discovery and the foreign bank says well, at home in
14 Switzerland our banking laws prohibit -- our banking privacy
15 laws prohibit us from disclosing this information. And then
16 you've got the bank whipsawed between the American discovery
17 obligations and the Swiss privacy rules.

18 That's not the case here. That's not the case here.
19 AECL has not identified a conflicting set of legal obligations.
20 AECL hasn't suggested that it is subject -- they don't concede
21 they're subject to the jurisdiction of this court, which means
22 they don't concede that they're subject to legal sanction at
23 home if they comply with the court order here because their
24 position is this court can't issue an order to them here.

25 So, the whole comity analysis is just misplaced.

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1 Unless you have an actual conflict of legal obligations you
2 don't need to engage in it.

3 THE COURT: Well, in Aerospatiale there's language --
4 and I realize it's broad -- that says the following, "In
5 supervising pretrial proceedings, American courts should take
6 care to demonstrate due respect for any special problem
7 confronted by the foreign litigant on account of its
8 nationality or the location of its operations and for any
9 sovereign interest expressed by a foreign state." And that is
10 a quote. And that decision, it seems to me, comports with
11 traditional notions of international comity.

12 So are you suggesting I disregard that direction from
13 the Supreme Court here because there aren't the kind of
14 conflicts that you describe were implicated more specifically
15 in that case?

16 MR. KORDE: I believe that Aerospatiale is
17 inapplicable here.

18 Your Honor, the quote you just read specifically
19 references the fact that the court should be solicitous where
20 there is a foreign litigant.

21 AECL is not a litigant in this matter. AECL is not a
22 party in this matter. They've strenuously resisted being
23 anything but an amicus.

24 THE COURT: Well, you know a lot of this dispute boils
25 down to language.

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1 You're correct. They are an amicus and there's been a
2 lot of back and forth about that.

3 The word litigant can be defined pretty broadly. If I
4 am a nonparty who is served with a Rule 45 subpoena and I want
5 to challenge it and I make a motion to quash that subpoena in
6 court, I think I'm a litigant, aren't I?

7 Now this is an unusual scenario because they are not
8 in the United States, not susceptible to a Rule 45 subpoena.
9 The way you can obtain the information you want is through a
10 letters rogatory.

11 You, I believe, agreed that they could present their
12 position to the court. Does that not make them a litigant in
13 some definitional sense of the word?

14 I think, you know, they're doing it as an amicus. You
15 would say well they're doing it as a friend of the court rather
16 than as a litigant. It's semantic a little bit.

17 And I don't mean to overstate this.

18 But I'm concerned that there are, in fact, issues of
19 international comity that are implicated here. I have a
20 Canadian court who has specifically directed that this court
21 revisit and review something that was already before this
22 court, before Judge Swain, last spring. So, I hardly want to
23 make short work of the direction that's been given from the
24 Canadian court here.

25 Obviously, we're going to issue a decision that

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1 squarely takes on the question of the Foreign Sovereign
2 Immunities Act and its implications here because that's what
3 the Canadian court has asked us to do and the parties have
4 their arguments, as we're discussing.

5 But I guess I'm a little concerned that your position
6 seems to suggest I don't need to go down the road as much as I
7 think perhaps I do.

8 MR. KORDE: I think, your Honor, the reason this court
9 doesn't, with respect, need to go as far down the road as
10 perhaps it might, on its initial review, think is that in the
11 Aerospatiale cases, Aerospatiale and its progeny, there is
12 no -- once the court rules that the foreign litigant has to do
13 something, there is no further protection for that foreign
14 litigant. If the Swiss bank is required to produce the
15 documents, it's required to produce the documents. It has no
16 further recourse.

17 By contrast, if your Honor issues a letter request,
18 AECL does have additional recourse and that is to oppose the,
19 as it did, the letters of request in the Canadian courts.

20 So, the comity analysis comes into play when one judge
21 has to balance two competing legal regimes.

22 Here, this court doesn't need to balance two competing
23 regimes. This court needs to decide under its own laws whether
24 the letter request is properly issued. And then the Canadian
25 courts can decide under their laws whether the letters of

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1 request are properly enforced or enforceable.

2 So, there is no one person trying to balance the
3 equities between two competing legal systems. Rather, the
4 letter of request process in and of itself handles that
5 balancing because it allocates to this court the responsibility
6 of issuing the letter of request. And it allocates to the
7 Canadian court the responsibility of deciding whether to
8 enforce the letter request, whether to narrow it, what in its
9 discretion should or should not be done, how that enforcement
10 procedure should take place.

11 THE COURT: Well, you know, there are a number of
12 factors that are implicated if I follow the Supreme Court's
13 guidance in terms of things along the lines related to the
14 importance of the information requested; other methods of
15 securing the information, balancing national interests, among
16 other things.

17 These are all things that the parties, or I should say
18 Lantheus and AECL have briefed to me. So, sort of by dint of
19 your submissions alone you have kind of implicated this
20 framework even if you don't think it otherwise is necessary for
21 me to consider. After all, you've laid out in great detail the
22 efforts that you made both informally and now formally,
23 including the spate of recent letters I got from both sides
24 about the status of all of that. I assume you sent that to me
25 because you think it has some ramifications in some way of

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1 what's before me, right?

2 Well maybe I should ask it a different way. The
3 Freedom of Information Act equivalent in Canada that you have
4 pursued, what difference, if any, does that make to the
5 issuance of letters rogatory here?

6 MR. KORDE: Your Honor, I don't believe it does.

7 May I approach? I need to supplement the record
8 somewhat. There's a subsequent communication on the access to
9 information request that I should draw to the Court's
10 attention. I didn't want to spark another letter-writing
11 campaign when I knew we were having oral argument.

12 THE COURT: You've given a copy of this to --

13 MR. KORDE: Yes.

14 MR. KRAININ: Yes.

15 MR. KORDE: This is a letter from the information
16 office, back from Mr. McCluskey.

17 The information commissioner says, or the staff person
18 says the results of the investigation are that your complaint
19 is well founded. He does go on to say that your complaint is
20 resolved as AECL has provided a reasonable work plan and
21 commitment date of February 1, 2011 to respond to your request.
22 I assume he means 2012.

23 But again I would point out here -- this is, again,
24 part of the factual dispute is, you know -- there is no
25 evidence in the record that AECL is taking meaningful steps to

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1 gather and locate documents. There is no evidence in the
2 record as to what they're going to produce. There is no
3 evidence in the record as to whether the stuff is going to be
4 as substantially and horribly redacted as the stuff we
5 initially got.

6 So I think the ATI request doesn't really have a
7 substantial bearing on this. For that reason, and for the more
8 important reason that the -- I think this is really the
9 fundamental issue. The ATI request doesn't allow Lantheus to
10 obtain testimony. And that's crucial here. Because they say
11 well we'll stipulate the documents are authentic. That really
12 doesn't do it. I can show authentic documents to the jurors
13 all day long and they're not going to understand them because
14 these are technical documents. They're chemical analyses.
15 They're data analyses. They're raw data. So without
16 testimony, foundational testimony from someone to put these
17 documents into context, the jury is never going to understand
18 them.

19 And, along this same lines, because these are
20 documents that deal with engineering tests and chemical tests
21 and data analysis, Lantheus needs to be able to ask AECL to put
22 the documents into context and to, you know, inquire about the
23 documents.

24 You ran this test. Did you account for this
25 possibility of systematic error? This possibility of

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1 nonsystematic error? Why did you run this test as opposed to
2 that test? Why did you look at this parameter? Did you
3 control for this variable?

4 We need to be able to ask those sorts of questions
5 that are based on the documents but that go beyond the
6 documents in order to understand what the information is and
7 what the data is.

8 So, I don't think the ATI request answers the -- what
9 we need.

10 THE COURT: Isn't everything you've just said really
11 an argument to be made to the Canadian court more than to me?

12 MR. KORDE: Absolutely, your Honor.

13 THE COURT: So why is all of that before me?

14 MR. KORDE: Your Honor, they raised it. I felt I had
15 to respond to it.

16 Our position is, I think, as I said at the outset,
17 this a straightforward question.

18 Does the FSIA apply or not? We think it doesn't
19 apply. So we think the letters rogatory can issue.

20 THE COURT: Let me -- I'm sorry to skip around a
21 little bit, but I was looking at some of the notes I made and
22 issues that I wanted to cover with you.

23 I wanted to go back to the exception to the statute
24 for a minute.

25 MR. KORDE: Sure.

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1 THE COURT: With respect to direct effects, do you
2 think that financial loss alone is sufficient to demonstrate a
3 direct effect if I go down that path and find that the act
4 applies but that the exception may apply? Would it apply if
5 the financial loss that's been described is something in the
6 record sufficient for me to find that? Or is there more that
7 needs to be there?

8 MR. KORDE: Your Honor, I don't think you need to
9 answer that question because I think there is more in the
10 record as to direct effects.

11 There's, in addition to the financial loss that
12 Lantheus suffered, there is the inability of Lantheus to
13 produce its product, the inability of Lantheus to meet its
14 customer commitments as a result of the NRU shutdown, the
15 inability of Lantheus to fulfill customer contracts. That's
16 one set of direct effects.

17 And then you've got a second set of direct effects
18 which we also talk about which is the fact that you've got
19 hundreds of thousands of American patients per week who can't
20 have critical diagnostic procedures. We're not talking about
21 strep throat swabs. We're talking about tests for coronary
22 heart disease.

23 So these are important medical procedures. Hundreds
24 of thousands of Americans per week are being deprived of them
25 or were deprived of them. That we think is also a substantial

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1 direct effect.

2 And just to follow through on that thought, it's that
3 direct effect that the Canadian government itself cited back in
4 2007, when the reactor was shut down for regulatory reasons, in
5 restarting the reactor. They said we need to restart this
6 reactor because, among other things, 400,000 Americans per week
7 are being impacted by the shutdown.

8 So we think that's -- there's more here than just a
9 simple financial loss. So I don't think you need to address
10 the question of whether a simple financial loss would be
11 sufficient.

12 THE COURT: All right.

13 Why don't I -- I've had you up here for a while. I'll
14 let you certainly have a right of reply. But let me hear from
15 counsel for AECL at this point.

16 MR. KORDE: Thank you, your Honor.

17 MR. KRAININ: Thank you, your Honor.

18 Daniel Krainin on behalf of AECL.

19 THE COURT: Yes, Mr. Krainin.

20 MR. KRAININ: And I'd like to beginning by thanking
21 the court for allowing AECL to have the opportunity to be heard
22 today on these important issues of foreign sovereign immunity.
23 We would agree with the court's opening remarks and disagree
24 with Lantheus that the Foreign Sovereign Immunities Act and the
25 issues presented here do raise a number of complex issues.

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1 Lantheus would have the court believe that it doesn't, and that
2 this is simply ministerial, and that the court can and should
3 issue letters rogatory to any foreign sovereign under any
4 circumstances whatsoever and simply let the foreign sovereign's
5 home court sort it out.

6 In contrast, we believe that the policy provisions
7 underlying both the Foreign Sovereign Immunities Act, the
8 principles of foreign sovereign immunity, and the principles of
9 international comity dictate that the letters should not issue
10 in this case.

11 First of all, AECL is a Crown corporation, fully owned
12 by the Canadian government, as the Court knows.

13 AECL and Canada have strong sovereign interests with
14 respect to the information that Lantheus seeks in this case.

15 THE COURT: Well let me interrupt for a second.

16 The information that's sought is still, if the letters
17 rogatory are issued, going to be the subject of the Canadian
18 court's scrutiny so that, if I can analogize again to the Rule
19 45 scenario, if you are in the United States and this subpoena
20 was served on you, and you made a motion to quash, the motion
21 to quash could be both on sovereign immunity grounds and also
22 because of the scope of it and the security issues implicated
23 alike.

24 Here, those questions, as I understand it, by dint of
25 the fact that we're talking about letters rogatory, will all be

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1 before the Canadian court, not before this court; isn't that
2 right?

3 MR. KRAININ: That's correct to a certain extent, your
4 Honor.

5 Certainly AECL, should this court issue letters
6 rogatory, AECL will have an opportunity to object and certainly
7 will object to their enforcement in Canada.

8 However, the question that's before this court is
9 whether the issuance of the letters themselves is proper under
10 these circumstances. And the answer is no under the dictates
11 of the principles of foreign sovereign immunity and the
12 principles of international comity, specifically the foreign
13 sovereign immunity principle that foreign sovereigns should be
14 free from the burdens of litigation and discovery from U.S.
15 courts.

16 Lantheus -- first of all, the sovereign interest at
17 stake here, Lantheus likes to characterize as simply a
18 commercial dispute relating to the radioactive isotopes that
19 Lantheus ultimately receives after further processing from an
20 intermediary in Canada and uses in its commercial equipment.

21 The information they seek, and the interests that are
22 at issue for AECL relate to the national research -- nuclear
23 research universal reactor in Chalk River, Ontario.

24 The NRU reactor is a national nuclear research
25 facility.

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1 The incident at issue that was the cause of the
2 shutdown relates to the design and operation of that reactor.
3 And that national nuclear reactor and facility raise a whole
4 host of national security and public interest issues that are
5 very important to AECL. And AECL is charged with protecting
6 them by the Canadian government.

7 THE COURT: Aren't those issues for the Canadian court
8 and not for this court?

9 MR. KRAININ: Well, your Honor, it is for this court
10 to consider whether it would be appropriate to ask a Canadian
11 court to enforce the discovery requests under these
12 circumstances.

13 And specifically, responding to one of the points that
14 your Honor made in the discussion with counsel for Lantheus, I
15 would certainly agree that there is absolutely no case law on
16 point that finds that it would be -- that analyzes the issue
17 and then finds that it would be proper to serve letters
18 rogatory in a circumstance such as this.

19 There is, however, one case directly on point that
20 does analyze the issue and finds that it would be improper to
21 serve letters rogatory to a foreign sovereign; that's namely
22 the Seoul Semiconductor case. And the Seoul Semiconductor case
23 does precisely what the Aerospatiale, Supreme Court said in
24 Aerospatiale. It reviews the five principles of international
25 comity. And be it not only -- I understand Lantheus' point

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1 that Aerospatiale was decided in a different context. However,
2 the Restatement of Foreign Relations Law, Section 473
3 Reporters' Notes 5, specifically addresses the context we have
4 here in this court, the dispute before you today. And that
5 part of the Restatement says that the court must analyze the
6 comity principles set forth in Aerospatiale.

7 That's precisely what the Seoul Semiconductor case
8 did; and in so doing, came to the conclusion that it would be
9 inappropriate, that it would infringe upon the principles of
10 foreign sovereign immunity and international comity to issue
11 the letters and to ask a foreign tribunal to enforce them.

12 THE COURT: Let me go back to first principles with
13 you as well.

14 Have I been asked to assert jurisdiction over AECL by
15 Lantheus' application to this court for the issuance of letters
16 rogatory?

17 MR. KRAININ: Your Honor, I believe that this court is
18 most likely without power to assert jurisdiction over an entity
19 that is not within this court's territorial jurisdiction.

20 However, the issuance of the letters rogatory
21 themselves is tantamount to an assertion in exercise of
22 jurisdiction insofar as it is a request, it is -- it would be
23 asking another tribunal in a foreign nation to exert
24 jurisdiction on behalf of this court and for the purpose solely
25 of the commercial dispute between Lantheus and Zurich that's

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1 pending before this court.

2 THE COURT: Well, that's sort of the nub of
3 everything.

4 I mean you said it's tantamount to. And really,
5 again, not to be overly analytical about language, but it boils
6 down to whether, in fact, it is, to use your phrase, tantamount
7 to or not, doesn't it?

8 MR. KRAININ: Your Honor, we would certainly argue
9 that because it is tantamount to the exercise of jurisdiction
10 that the Foreign Sovereign Immunities Act and the principles
11 underlying it apply.

12 However, if the court disagrees with that, then it's
13 clear that the principles of international comity ought to be
14 applied within the Court's discretion as to how those
15 principles shake out and what that dictates here.

16 But certainly, again, the Restatement and the Seoul
17 Semiconductor case show that that's what a court can and should
18 do in these circumstances if it reaches -- if it finds that the
19 answer is unclear under the Foreign Sovereign Immunities Act
20 itself.

21 THE COURT: Well there is nothing in the Foreign
22 Sovereign Immunities Act itself that addresses the issue before
23 me, right?

24 MR. KRAININ: Correct.

25 THE COURT: There's nothing in the legislative history

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1 that addresses it, right?

2 MR. KRAININ: Correct.

3 THE COURT: Indeed, arguably the legislative history
4 seems to suggest that they didn't intend to deal with discovery
5 issues in the context of the Foreign Sovereign Immunities Act
6 and left that for the Federal Rules of Civil Procedure or
7 otherwise.

8 MR. KRAININ: I think it's safe to say that the
9 language of the Foreign Sovereign Immunities Act itself does
10 not address the situation before the court today.

11 However, I think it's also clear to say that the
12 interpretation of the Foreign Sovereign Immunities Act by the
13 Supreme Court, for example in the Dole Foods case in which the
14 Court said that a fundamental principle underlying that or one
15 of the fundamental principles was to protect foreign states
16 from the inconvenience of suit as a gesture of comity between
17 the United States and other sovereigns.

18 Likewise, the Second Circuit in the EM Limited case
19 has explained that the Foreign Sovereign Immunities Act is
20 intended to provide immunity not only from liability but also
21 from the burdens of litigation, including discovery.

22 And so Lantheus -- in Lantheus' view we would have the
23 anomalous result that the Court alluded to earlier which would
24 be that they could not hail AECL into court here if AECL had a
25 presence in the United States either as a party to the action

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1 or as a third party through a Rule 45 subpoena for discovery.
2 But because AECL is further removed from the United States and
3 from this Court's jurisdiction, Lantheus seems to think it
4 should have greater rights and should have the opportunity to
5 ask this court to do what it could not do within the United
6 States domestically by reaching out to a foreign tribunal and
7 asking that tribunal to exercise jurisdiction on behalf of this
8 court.

9 And the principles set forth in the U.S. v. Weisberg
10 case is directly on point here, which said that letters
11 rogatory are simply a means to obtain information or to obtain
12 something to which parties are otherwise entitled.

13 In this case Lantheus is not otherwise entitled to the
14 information it seeks. It would not be entitled to it if AECL
15 had presence in the United States. And so Lantheus should not
16 have a greater right to the information for a party that's
17 further removed.

18 If we took the logical extension of Lantheus'
19 position, not only could and should courts always simply sign
20 as the court -- your Honor alluded to in the Al-Misehal case,
21 simply sign the form or agree -- there was no objection in that
22 case to the issuance of the letters rogatory. It was signed as
23 a ministerial act. And Lantheus would argue that that should
24 happen all the time in any circumstances with any foreign
25 sovereign.

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1 And beyond that, Lantheus makes the point in its
2 papers that AECL does have a presence in the United States in
3 the form of the Canadian embassy and consulates. Well if
4 that's right, then all foreign sovereigns have a presence
5 within the United States and any discovery that is sought of a
6 foreign sovereign, there would never be a need for a Rule 45
7 subpoena or to implicate the Foreign Sovereign Immunities Act.
8 One could always get around that by simply asking the court for
9 letters rogatory, which again on Lantheus' view the court
10 should simply sign off on without further thought and then
11 proceed in the foreign tribunal to obtain the discovery sought
12 for purposes of an action in U.S. courts.

13 THE COURT: Is it correct that AECL is not immune from
14 discovery enforced by a Canadian court?

15 MR. KRAININ: That is correct as a general principle,
16 yes, your Honor.

17 However, there are certainly a number of limitations
18 on information and discovery that AECL can divulge.

19 THE WITNESS: Let's stay at ground level for a minute.

20 MR. KRAININ: Certainly.

21 THE COURT: If that's true, then how can AECL be
22 immune from discovery that's being enforced by a Canadian court
23 using its own powers and in response to a letters rogatory
24 issued by this court?

25 MR. KRAININ: Again, your Honor, that would be a

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1 fact-specific inquiry that a Canadian court would have to
2 undertake in terms of whether the information sought here is
3 discoverable given that it relates to a national nuclear
4 research reactor and the design and operation of that reactor.

5 The question for this court is whether it's
6 appropriate to even ask a foreign tribunal to enforce those
7 letters or to ask a foreign sovereign to be subject to
8 discovery for purposes of an action pending here in the U.S.

9 THE COURT: Let's go back to the Weisberg case for a
10 minute that you mentioned earlier.

11 In that case, as I recall and my notes suggest, they
12 say that a letters rogatory is a means to obtain discovery to
13 which a party is otherwise entitled.

14 MR. KRAININ: Correct.

15 THE COURT: And you say they're not otherwise entitled
16 here because if you were in the United States the Foreign
17 Sovereign Immunities Act would apply and, therefore, you would
18 be immune from having to produce it, correct?

19 MR. KRAININ: Yes.

20 THE COURT: Let's talk about the exception to the Act.
21 Tell me why the direct effects, the commercial
22 exception doesn't apply here from your standpoint.

23 MR. KRAININ: Certainly. Two main reasons, your
24 Honor.

25 First of all, again, the information that Lantheus

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1 seeks here is not commercial in nature. It relates to design
2 and operation and maintenance of a nuclear research reactor and
3 vessel within that reactor in Canada.

4 THE COURT: Well that I think is somewhat -- I don't
5 want to use a pejorative word but I'm going to say a somewhat
6 cramped view of what I think they're seeking. That may be part
7 of what they're seeking, but I think they're seeking a lot of
8 different things as they've articulated it. And it's not for
9 this court to assess the scope of their request per se other
10 than, I think, to evaluate it in the context of the application
11 of the exception potentially.

12 But go ahead.

13 MR. KRAININ: I would certainly agree, your Honor.
14 They are seeking a lot of things. And that's yet another
15 problem with the letters rogatory. They're extremely broad and
16 lacking in specificity and because --

17 THE COURT: But the broadness and lack of specificity
18 is for the Canadian court and not for me, isn't it?

19 You don't not issue a letters rogatory because it's
20 too broad.

21 MR. KRAININ: Actually the lack of specificity is one
22 of the factors set forth in *Aerospatiale* and the Restatement
23 that the Court ought to consider --

24 THE COURT: Well *Aerospatiale* wasn't a case like this
25 one.

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1 MR. KRAININ: It was not.

2 THE COURT: I understand you want me to borrow from
3 that case and there are good reasons why I should take it
4 seriously. But you know what's difficult about this case, and
5 one of the reasons I wanted to have the argument, is I think
6 we're making law in this case and I want to be careful how we
7 do that and give everybody an opportunity to make a full record
8 so that I can understand what you all think about all of these
9 issues.

10 But anyway I'm sorry I interrupted you.

11 MR. KRAININ: Certainly. Just to address that point.
12 Again, to refer the court to the Restatement of Foreign
13 Relations Laws Section 473 Reporters' Notes 5 which says "A
14 court in the United States issuing a letter of request for
15 foreign discovery must consider the matters listed in Section
16 442(1)(c)" which are the Aerospatiale factors, which
17 includes -- it specifically identifies the specificity of the
18 request, the origin of the information, and the importance of
19 that.

20 THE COURT: Did you cite that provision in your brief?

21 MR. KRAININ: We did, Your Honor. I don't recall
22 exactly where or to what extent but it is in there.

23 MR. KORDE: That's fine. I know the Restatement has
24 been cited. I just didn't remember the particular provision
25 that you were just identifying.

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1 MR. KRAININ: It's cited at page eleven.

2 THE COURT: Yes. I see that in your brief.

3 MR. KRAININ: Returning to the commercial activity
4 exception and the question that the court asked regarding
5 direct effects. First and foremost, the information sought, at
6 least part of the information sought by Lantheus, again, is not
7 commercial in nature. It goes to a national nuclear research
8 facility reactor design and operation which is used not only in
9 the context of refining highly enriched uranium into
10 radioactive isotopes which are then sold to a party in Canada,
11 Nordion, which further processes them and prepares the
12 radioactive isotopes that Lantheus uses in its commercial
13 equipment. That's only one purpose of the reactor. The
14 reactor is also used for research purposes. It's also used to
15 support the nuclear power industry in Canada and has important
16 noncommercial applications there. That's issue number one.

17 Issue number two is the existence of the intermediary.
18 The direct effect case law is the quite clear that in order for
19 that to apply, the effect must be immediate and direct. I
20 believe it's the Guirlando case in which the Second Circuit
21 said that direct effect means an immediate consequence, no
22 intervening element, the effect flows in a straight line
23 without deviation or interruption.

24 And we have an intervening element here, namely the
25 actor Nordion which takes the material it obtains from AECL and

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1 it further processes it, refines it and creates the product
2 that Lantheus purchases.

3 THE COURT: Well what role did Nordion play, if any,
4 in the ultimate shutdown of the reactor?

5 None? Right?

6 MR. KRAININ: Correct.

7 THE COURT: So I understand they are an intermediary.
8 But isn't the key nexus between the shutdown, which is AECL's
9 responsibility, and its impact on Lantheus?

10 MR. KRAININ: Well, that would take us back to my
11 original point which is the shutdown of the reactor itself is a
12 much broader -- is much broader than a commercial act with a
13 direct effect in the United States. It has many effects within
14 Canada that are noncommercial in nature.

15 THE COURT: Well but as long as it has an impact that
16 has a commercial effect in the United States, why then isn't
17 that sufficient for the exception to be implicated and applied?

18 MR. KRAININ: Well, the case law interpreting the
19 direct effect language under the commercial activity exception
20 is clear that the effect must be direct and immediate. And the
21 cases typically arise in the context of contracts.

22 Both parties have cited the Cruise Connections case in
23 which the plaintiff there, which owned a cruise ship business,
24 had obtained ships and had contracted with the Royal Canadian
25 mounted police to make them available in Canada in connection

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1 with the Vancouver Olympics. There was a breach of contract
2 there. But that was -- the foreign sovereign, the Royal
3 Canadian mounted police, were a party to that contract. And
4 their alleged breach naturally had a direct effect in the
5 United States with respect to the entity it contracted with,
6 the performance of the contract, a number of activities that
7 relate directly to the facts specifically there between the
8 parties and including the foreign sovereign.

9 Here, Lantheus is not in privity of contract with
10 AECL. There is no direction connection. AECL is under no
11 contractual obligation to produce these radioactive isotopes or
12 to process them. It could stop at any time and that would be
13 well within its right.

14 THE COURT: Do you think there has to be a contractual
15 relationship for the direct effects test to apply there?

16 MR. KRAININ: Not necessarily, although the majority
17 of the case law does involve contracts, breaches of contracts,
18 and those kinds of direct effects.

19 Here it's much more attenuated given the multiplicity
20 of purposes of the reactor, the extent to which that is within
21 the control of the Canadian government. And it's simply a
22 tangential effect that after -- because of a shutdown of the
23 reactor, a breach of a vessel within the reactor, that AECL was
24 unable to produce isotopes which are sent to a third party for
25 further processing, further refining before they are sent to

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1 Lantheus here in the United States.

2 THE COURT: Let me ask you what I asked Mr. Korde,
3 which is hypothetically speaking, let's say I agree with you
4 that the Foreign Sovereign Immunities Act is implicated far
5 more significantly than Lantheus counsel thinks it is and so I,
6 therefore, look to whether any exception applies.

7 Is it your view that the record before the court at
8 present is sufficient for me to be able to decide that
9 question, or is there something more that needs to be in the
10 record on that point?

11 MR. KRAININ: No, your Honor. Our view is that the
12 record is more than sufficient to reach a conclusion based on
13 the nature of AECL's reactor and the operation of it in Canada
14 as well as the existence of the intermediary Nordion which is
15 undisputed. It's alleged -- we cited to Lantheus' complaint
16 for that particular fact. And we don't think anyone disputes
17 that Nordion is involved in the chain of distribution and an
18 intermediary between AECL and Lantheus. And, thereafter, we
19 don't believe there's any -- we don't believe it would be
20 fruitful for discovery. The court has the information it needs
21 to determine whether the commercial activity exception applies
22 here.

23 THE COURT: We've looked at a lot of cases but are
24 there any cases that analyze the direct effects test in the
25 context of nonparty discovery from a foreign sovereign?

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1 MR. KRAININ: Not that I'm aware of, your Honor.

2 THE COURT: As I've said before, I think this case
3 raises a lot of novel questions, that being yet another one, I
4 suspect.

5 MR. KRAININ: Yes, indeed.

6 Again, the Seoul Semiconductor case analyzes the issue
7 of nonparty discovery from a foreign sovereign. It does not,
8 however, address the direct effects or commercial activity
9 exception.

10 THE COURT: Do you have other arguments?

11 MR. KRAININ: Only to emphasize, your Honor, that,
12 first of all, AECL takes very seriously the sovereignty
13 interests that are implicated by this request for discovery and
14 also that the process is underway in Canada. There are
15 alternative means for Lantheus to obtain the same basic
16 information that it seeks here; namely, the access to
17 information process which is nearing completion now. It's the
18 equivalent of our Freedom of Information Act process.

19 Lantheus has, if it's not satisfied with the
20 information it obtains through that process, it has a right to
21 judicial review or to appeal, to challenge. As you've seen
22 from some of the recent correspondence and submissions, it's
23 making its complaints known to authorities in Canada. And it
24 has a further right, if it's unsatisfied with what it receives
25 from that process, to judicial review and appeal what AECL

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1 provides for that process.

2 So, we think it would be -- it's unnecessary here;
3 that Lantheus is going to obtain whatever information it's
4 entitled to under Canadian law pursuant to that ATI process.
5 And the Court need not take the extraordinary step of issuing
6 letters rogatory to a foreign sovereign which would
7 essentially, at the end of the day, be largely duplicative and
8 would simply require the sovereign to engage in enforcement
9 proceedings and object and defend and litigate over the same
10 basic information that Lantheus will receive to the extent it's
11 entitled to it.

12 THE COURT: All right. Thank you.

13 MR. KRAININ: Thank you.

14 THE COURT: Mr. Korde, what did you -- well, counsel,
15 do you want to be heard before Mr. Korde speaks?

16 MS. KIRWIN: Just very briefly, your Honor.

17 On behalf of Zurich, I mean at the conclusion of the
18 argument, the only point that we wanted to make was to the
19 extent that the court does issue the letters rogatory we would
20 like it to be mentioned in the letters rogatory that Zurich
21 would also have the right to obtain copies of any documents
22 that are received and to participate in any discovery as well.
23 I mean it may be an academic point that I'm making but we
24 wanted to make sure it was included in the letters rogatory.

25 THE COURT: If I do rule that the letters rogatory

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1 should be issued then I assume when they are finally submitted
2 to the court that such language could be included in there but
3 we're not there yet.

4 MS. KIRWIN: Okay. And I didn't mean to cutoff
5 Mr. Korde.

6 THE COURT: That's all right.

7 Mr. Korde, what did you hear from counsel that
8 requires a response.

9 MR. KORDE: Your Honor, I think that just a couple of
10 points very quickly.

11 I heard Mr. Krainin say a couple of times that the
12 issue before the court was whether it's even appropriate for
13 this court to ask the Canadian courts for assistance. And it
14 seems to me that that's really the nub of the issue. Is it
15 even appropriate for this court to ask the Canadian courts for
16 assistance?

17 And it seems to me the answer to that question has to
18 be of course it's appropriate. I mean it's -- what AECL is
19 suggesting is that it's not appropriate for this court to make
20 a request. But there's nothing in any of the cases that either
21 party has cited, there's nothing in the text of the FSIA that
22 says it's not appropriate to make a request.

23 THE COURT: Well the Canadian court essentially
24 redirected this to this court to determine what the
25 implications of the Foreign Sovereign Immunities Act are.

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1 One of the implications could be that it applies, no
2 exception applies, and therefore the letters shouldn't issue.
3 That's a scenario.

4 I'm not suggesting that the Canadian court
5 contemplated that result. I don't think anything in the
6 Canadian court's decision suggested what the Canadian court
7 ultimately thought other than it was deferring to this court to
8 assess the implication in the first instance.

9 But if that were a scenario, then the letters wouldn't
10 issue, right? And that's presumably what the Canadian court
11 wanted this court to at least consider.

12 MR. KORDE: I certainly agree that that's what the
13 Canadian court wanted this court to consider.

14 But it seems to me at the conclusion of the
15 consideration, to adopt AECL's position that it's inappropriate
16 to even ask the question would be a ruling that would, we
17 think, would be far afield from what little case law there is
18 and what little statutory guidance there is, particularly in
19 this case because the documents and information that Lantheus
20 is seeking are critical, they're vital to this case. They're
21 vital to this case.

22 THE COURT: How do you respond to what Mr. Krainin
23 said about the ATI process and if you don't get satisfaction in
24 that process you can seek judicial review of that as one can in
25 this country as well with respect to a FOIA request and that

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1 you would be litigating that issue anyway independent and apart
2 from the letters rogatory process?

3 MR. KORDE: Your Honor, I think that's incorrect. I
4 think Mr. Krainin's argument misses the mark.

5 THE COURT: There isn't judicial review of --

6 MR. KORDE: No. There is judicial review. But it's
7 unclear whether the judicial review would unfold in any
8 timeframe meaningful to the schedule in this case.

9 I mean we're talking about, first of all, appealing
10 the information commissioner's decision and then going through
11 multiple levels of judicial review. For that to unfold before
12 we get our documents means that this case schedule is stopped.

13 THE COURT: Well let's say I issue letters rogatory
14 this month or next, and then you take them and you go to the
15 Canadian court. You've heard that AECL is going to litigate
16 that in some fashion. That could also take a substantial
17 amount of time for multiple levels of judicial review, could it
18 not?

19 MR. KORDE: Your Honor, it could. And I think that
20 Mr. Krainin's concern was well there's some sort of duplication
21 here.

22 Lantheus is not trying to be unreasonable. If the
23 court issues the letters of request and AECL produces documents
24 that are responsive and unredacted to our ATI request and we
25 get everything we want, then obviously we're not going to

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1 continue to pursue an unnecessary duplicative proceeding.

2 But given the history of the ATI process to date, to
3 forestall issuing the letters rogatory on the basis of the ATI
4 I think would be problematic. AECL has routinely given
5 themselves extensions when the deadline for response comes
6 around. They have cumulative extensions now of nine months.
7 They have -- when they do produce documents, the documents are
8 redacted of all substantial information so they're not
9 particularly useful in this case.

10 So, the history here is that the ATI process has
11 proved completely unfruitful

12 THE COURT: Let me ask something in light of sort of
13 the history here. I think I can assume the answer but one
14 should never assume.

15 Is there any possibility at this juncture of this
16 proceeding and the history that's been recounted today of any
17 sort of a negotiated resolution of this dispute, or are we past
18 that possibility?

19 MR. KORDE: Your Honor, we attempted to reach a
20 negotiated resolution of this dispute over the summer when the
21 first enforcement proceeding was playing out and Lantheus made
22 a -- and it's in the record, a quite detailed and specific
23 proposal, part of which included narrowing the document
24 requests. And that -- the narrow document requests are
25 reflected in the amended letters rogatory. So, we've

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1 unilaterally done what we said we would do as part of the
2 negotiated settlement.

3 We also proposed various mechanisms to deal with their
4 national security concerns and their confidentiality concerns
5 and their concerns about the cost of producing these documents.

6 We're certainly happy to continue negotiating. We're
7 certainly happy to engage in further discussion with AECL but I
8 think that's where the matters stand.

9 THE COURT: You never received a meaningful response
10 to that proposal?

11 MR. KORDE: I don't want to speak out of school, your
12 Honor. My proposal is my document so I can waive the
13 settlement privilege.

14 THE COURT: All right. That's fine. I don't want
15 anyone compromising anything.

16 But suffice to say that at the moment anyway there's
17 nothing I should know that would suggest that I should forebear
18 from undertaking issuing a decision because the parties may
19 need a decision to help them work through these issues. Is
20 that a fair statement?

21 MR. KORDE: That is a fair statement, your Honor.

22 THE COURT: All right. Did you want to say anything
23 about that, Mr. Krainin?

24 MR. KRAININ: I'm not fully privy to any negotiations
25 that have gone on in Canada.

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1 The only thing I did want to say with respect to your
2 last comment is that it might be productive to wait and see --
3 the deadline is now a final deadline with respect to the ATI
4 process is February 2, less than two months away. And Lantheus
5 may or may not be satisfied with documents it receives at that
6 point. But that would be one thing that I would suggest that
7 the court might want to consider waiting to see.

8 THE COURT: My best guess is Mr. Korde doesn't want to
9 wait. And the Court schedule permitting, I certainly am going
10 to try to get a decision out before February 2.

11 MR. KORDE: Just to address that point, your Honor.
12 Part of the issue of waiting is that once we get the letters
13 rogatory we need to go back to the Canadian courts to get a
14 hearing date, and certainly to try and get an expedited hearing
15 date, but the Canadian courts are significantly congested. So
16 you wait two months, it may mean a lot more delay.

17 THE COURT: Did the judge who heard this matter
18 initially retain jurisdiction over it in any way?

19 MR. KORDE: She did not. She did not.

20 THE COURT: All right. Is there anything further?

21 MR. KORDE: The only sort of minor point so that
22 silence was not viewed as assent was I think there was some
23 mention if AECL were subject -- were in this country and there
24 was a Rule 45 subpoena issued it would not be enforceable. For
25 reasons that I'm sure your Honor is aware, namely the

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1 commercial activities exception, we disagree. If AECL was
2 present, we think a subpoena would be pursued.

3 THE COURT: Let's just take a short recess.

4 Off the record.

5 (Discussion off the record)

6 (Recess)

7 THE COURT: Please be seated everyone.

8 Mr. Korde, I wanted to ask you what your views are
9 about the Weisberg case; and in particular, that's the Eastern
10 District case, the language in Weisberg that talks about
11 "letters rogatory are simply a means to obtain discovery to
12 which party is otherwise entitled," and what do you think that
13 means?

14 MR. KORDE: Your Honor, I think that means that if --
15 if we came into this court and asked you to issue letters
16 rogatory to a party completely unconnected to this litigation,
17 you would say no. There has to be some -- and I think this is,
18 the Netherby case stands for the same thing, that the materials
19 requested need to be relevant to the dispute at issue.

20 I think Netherby says something similar that the
21 material needs to be discoverable under Rule 45.

22 THE COURT: Well what Judge Lynch says in Netherby,
23 among other things, is were the sub-licensee a domestic
24 company, there is no question that plaintiff would have simply
25 subpoenaed the documents and the subpoena would have been

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1 upheld.

2 But here if AECL were in the United States, the
3 Foreign Sovereign Immunities Act would be implicated at least
4 in the context of a Rule 45 subpoena, right?

5 MR. KORDE: It would be implicated but I don't think
6 it would be a bar because the conduct at issue falls squarely
7 within the commercial activities exception.

8 THE COURT: Let me sort of to this point ask you about
9 something that was in AECL's brief quoting your original
10 motion. This is footnote two of page four. I meant to ask you
11 about this earlier.

12 In your unopposed motion you claim that the
13 information that Lantheus was seeking is "Subject to discovery
14 by letters rogatory because it would be discoverable by a
15 simple subpoena if AECL were subject to process within the
16 United States."

17 And then AECL says, "The implication of Lantheus'
18 argument is that if information were shielded from discovery by
19 the FSIA and thus not discoverable by a simple subpoena, it
20 should not be discoverable by way of letters rogatory either.
21 That is the case here."

22 How do you respond to that?

23 MR. KORDE: Your Honor if you could just give me one
24 second to look at the quote.

25 The language you're quoting from, my recollection

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1 is -- I don't have it in front of me. My recollection is that
2 the quote is taken somewhat out of context.

3 I think the point is that -- I don't think the point
4 that or the implication that Lantheus was suggesting was that
5 the information should be -- if it's shielded from discovery by
6 the FSIA then it should not be discoverable by letters
7 rogatory.

8 I think the point was does -- the point that I think
9 Lantheus was making in the original papers was does AECL have a
10 presence here. And I think at that point the question in front
11 of the court was we'd like to get the letters rogatory because
12 it appeared to us at that point that AECL did not have a
13 physical presence in the United States.

14 THE COURT: Okay.

15 Mr. Krainin let me ask you one last question, if I
16 can.

17 MR. KRAININ: Certainly, your Honor.

18 THE COURT: From a policy perspective, to the extent I
19 should think about that at all, let's say that I conclude that
20 you're right that the Foreign Sovereign Immunities Act is
21 implicated in this fashion such that a letters rogatory can't
22 be a work-around, if you will. And let's say I were to find
23 that the commercial activities exception didn't apply.

24 From a policy standpoint is that the right result?

25 In other words, an American company who has the claims

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1 as Lantheus does here essentially runs into a wall if those who
2 have information that's central to at least some aspect of its
3 litigation here in the United States can preclude any access to
4 it through the shield of the Foreign Sovereign Immunities Act.

5 Is that the right result from a policy standpoint?

6 Do you understand what I'm asking and why I'm asking
7 you?

8 MR. KRAININ: I do understand the question, and I
9 believe the answer is yes. And that is exactly the policy that
10 underlies the Foreign Sovereign Immunities Act itself and the
11 case law interpreting it.

12 And the reason is with respect to a sovereign, because
13 of the principles of international comity, one needs to -- it's
14 not simply just a commercial entity in a foreign nation. And
15 there are ways to obtain information that is discoverable from
16 foreign national governments, specifically the access to
17 information request that Lantheus is employing.

18 And, therefore, that's the proper channel and the
19 proper vehicle and the means to obtain discoverable information
20 while still respecting the sovereignty of a foreign national
21 entity and, therefore, firmly say that it is the right result
22 from a policy standpoint.

23 THE COURT: Do you agree that if I were to rule in
24 your favor it would in effect be a narrow ruling, or do you
25 agree with Mr. Korde that, at least as he's put it, it will

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1 have ramifications beyond the narrow set of facts here in some
2 way that could adversely impact the way commercial cases
3 implicating a foreign entity, sovereign or otherwise, are
4 affected?

5 MR. KRAININ: Your Honor, I believe that would most
6 likely depend upon the scope and language of your opinion and
7 order in so ruling. I think there could be ways to reach that
8 result here that would be closely tied to the facts of this
9 case.

10 There are certainly other ways, if the court were to
11 find, for example, that the Foreign Sovereign Immunities Act
12 provides an absolute bar in immunity, that that would have
13 broad reach.

14 If the court looks a little bit beyond that into some
15 of the international comity factors and how they apply here, as
16 the Seoul Semiconductor case did, that would be a more limited
17 and narrow way to reach the same result.

18 With the court's indulgence, while the court was
19 consulting with its colleague I did the same with mine and I
20 would be remiss if I didn't point out one thing from the Seoul
21 Semiconductor case which cites, relies on the Aerospatiale case
22 to say that the Supreme Court's policy as articulated in
23 Aerospatiale favors placing the burden on the party requesting
24 discovery when requesting burdensome discovery from a French
25 citizen, as was the case in Aerospatiale and likewise in Seoul

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1 Semiconductor, the requester not only should show why the
2 request is relevant but also why it is not unduly burdensome to
3 a foreign party. I would simply ask that the court keep these
4 principles in mind with respect to the extremely broad requests
5 that Lantheus has put forward here both in terms of the breadth
6 of the document request and the deposition essentially of AECL
7 without any limitation, no designated issues or anything. It's
8 an extremely broad and burdensome request, and the burden is on
9 Lantheus to justify it, and we would submit they have not
10 carried that burden here.

11 THE COURT: All right. Thank you, Mr. Krainin.

12 Mr. Korde, was there anything else you wanted to put
13 on the record?

14 MR. KORDE: Your Honor, briefly. Two points.

15 One, on the Seoul Semiconductor case that my colleague
16 just mentioned, I think it's important that the court in that
17 case was considering whether or not, or viewed itself as
18 considering rightly or wrongly whether or not it should be
19 "compelling broad discovery" from an agent of a foreign
20 sovereign nation. That's 590 F.Supp. 2d 832.

21 We're not asking this court to compel AECL to do
22 anything. We're asking this court to make a request to the
23 Canadian courts.

24 The other point to your Honor's question about policy.
25 This is in -- the Milligan case makes this point quite clearly,

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1 that -- this is Milligan, 758 F.Supp. 2d at 238, "For
2 international commerce to operate efficiently, business
3 obligations must be subject to enforcement and the resulting
4 judgment subject to collection. The fair adjudication of
5 commercial interests in turn requires full discovery."

6 AECL made a decision to sell radioisotopes in the
7 stream of international commerce and that has had a certain
8 effect on international commerce and resulted in a commercial
9 dispute.

10 And we think that the discovery that we now seek is
11 crucial, it's vital to Lantheus' ability to prove up its case
12 and resolve this commercial dispute.

13 THE COURT: Well, is that an argument not that the
14 FSIA doesn't apply but that the exception does apply?

15 MR. KORDE: If your Honor wants to go down the road of
16 the FSIA, I think that's exactly the argument.

17 THE COURT: Anything else?

18 MR. KORDE: No, sir.

19 THE COURT: All right.

20 Are the parties going to order this transcript?

21 MR. KRAININ: Yes, your Honor.

22 THE COURT: All right. Very well.

23 Well, I thank you all for coming in. It was a very
24 helpful argument from the court's standpoint and your briefs
25 also have been helpful to the court.

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1 I'm going to reserve decision and I hope to get a
2 decision out in the near future.

3 Thank you all.

4 (Adjourned)